Supreme Court, U.S.
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No. 99-1481

IN THE

Supreme Court of the United States

USHA VAKHARIA, M.D.,

Petitioner,

v.

SWEDISH COVENANT HOSPITAL,
AMERICAN SOCIETY OF ANESTHESIOLOGISTS, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. In this case where a hospital peer review committee terminated plaintiff's hospital staff privileges based on unrebutted, unbiased and credible evidence presented during a nineteen-day hearing that plaintiff's care was substandard and a threat to patients, did the Court of Appeals and the District Court correctly rule that plaintiff failed to present sufficient evidence of pretext to survive defendants' motion for summary judgment on plaintiff's discrimination claims under the well-established burden shifting approach set forth in *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973)?

II. Whether the Court of Appeals and the District Court abused their discretion by denying plaintiff additional discovery when the case was three years old, voluminous discovery had already been permitted, and dispositive motions were fully briefed?

III. Whether the Court of Appeals and the District Court abused their discretion in denying plaintiff leave to file a proposed fourth amended complaint seeking to add expansive state-law claims after voluminous discovery had been taken in the three-year old case, and while dispositive motions were pending?

IV. Whether the Court of Appeals and the District Court abused their discretion in disregarding portions of plaintiff's 106 page, 555 paragraph Local Rule 12M statement of uncontested facts as replete with hearsay, self-interested conclusions and unsupported fact assertions?

V. Whether the Court of Appeals and the District Court employed the correct standard in determining that plaintiff lacked standing to assert Title VII and ADEA claims because she was an independent contractor, not an employee or applicant for employment with the Hospital?

CORPORATE DISCLOSURE STATEMENT

Respondent Swedish Covenant Hospital furnishes the following information in compliance with Supreme Court Rule 29.6:

(1) Swedish Covenant Hospital is a Section 501(c)(3) corporation. Its sole corporate member is Covenant Ministries of Benevolence.

(2) There is no parent or publicly held company owning more than 10% of the corporation's stock.

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STATEMENT OF THE CASE[1]

Swedish Covenant Hospital (the "Hospital") is a not-for-profit Chicago hospital affiliated with The Evangelical Covenant Church. At all pertinent times the Hospital staff was equally divided between American and foreign educated physicians. In 1984, the Hospital's leadership made a commitment to improve the Hospital's anesthesia care and expand the staff. (McCormick Aff. ¶¶ 20-21) The Hospital recruited new anesthesiology leadership, and in 1985 Nancy Loeber, M.D. joined the Hospital as head of anesthesiology within the Department of Surgery. (12M ¶ 66; McCormick Aff. ¶ 22; Loeber Aff. ¶ 2) Dr. Loeber was well-credentialed for the position. She was an instructor at Harvard Medical School and Director of Education and Residency Evaluation for the Department of Anesthesia Rotating Residents at Children's Hospital in Boston. During her professional training, she earned fellowships in both cardiovascular anesthesia and pediatric anesthesia. (Loeber Aff. ¶ 2; Def. Ex. 3)

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1. Defendants' Local Rule 12M Statement ("12M ¶¶ ___") and the supporting affidavits of James McCormick ("McCormick Aff. ¶ ___"), Nancy Loeber ("Loeber Aff ¶ ___"), Alan Rogin (Rogin Aff. ¶ ___), and Ronald Wender ("Wender Aff. ¶ ___"), Docket Number ("DK ___") 532, are reproduced in Appellees' Supplemental Appendix ("Supp. App."), submitted to the Court of Appeals, as Tabs 1-5, respectively. Defendants' Exhibits to Their Motion for Partial Summary Judgment ("Def. Ex. ___") are at DK 572-1 to 572-7. Def. Ex. 42, ASA on-site consultation program for SCH ("ASA Report"), is reproduced at Supp. App. Tab 6. Def. Ex. 68, Report of Ad Hoc Peer Review Committee ("Comm. Report"), is reproduced at Supp. App. 7. Def. Exs. 81-89, the Ad Hoc Hearing Transcript, is cited as "Trans." Plaintiff's Local Rule 12N Statement (12N, ¶ ___") is DK 539. "S__" and SA__" refer to Appellant's Appendix and Supplemental Appendix, submitted to the Court of Appeals.

In January 1986, a separate Department of Anesthesiology was formed and Dr. Loeber was appointed chair. Dr. Loeber had responsibility for all case assignment and staffing decisions. (12M ¶ 70; McCormick Aff. ¶ 24; Loeber Aff. ¶ 3; Def. Ex. 4) She also developed modern performance criteria for all types of anesthesia and a quality assurance system requiring all anesthesiology complications to be reported to her. (12M ¶¶ 73-76; Loeber Aff. ¶ 4; Def. Ex. 6) As part of that system, she and the quality assurance staff implemented a generic screening program for identifying problem cases through quality indicators in accordance with industry standards. (12M ¶ 77; Loeber Aff. ¶ 4; Def. Ex. 7; Loeber Dep. at 693-95)

Around March 1987, Dr. Loeber conducted a performance audit on Dr. Vakharia. (12M ¶ 79; McCormick Aff. ¶ 27; Loeber Aff. ¶ 6; Def. Ex. 8; Loeber Dep. at 472-73, 476-78, 709) The audit uncovered 13 cases in which Dr. Vakharia had difficulty intubating patients or failed to properly supervise unstable patients in the recovery room. (12M ¶ 80; Loeber Aff. ¶ 6; Def. Ex. 8) Eleven of the 13 incidents had occurred within one year of the audit. (Def. Ex. 8)

On March 27, 1987, Dr. Loeber wrote to Dr. Vakharia, asking her to explain the 13 cases. (Loeber Aff. ¶ 7; Def. Ex. 8; Loeber Dep. at 476-78, 710; Vakharia Dep. (DK576) at 361-63, 365-66) Dr. Vakharia responded much later, on September 3, 1987, by denying that the cases reflected problems with her care and blaming the reports on bias on the part of a nurse anesthetist. (12M ¶ 85-86; Loeber Aff. ¶ 8; Def. Ex. 10) Dr. Loeber considered Dr. Vakharia's answers unsatisfactory. (*Id.*)

In September 1987, Dr. Vakharia requested and received from Dr. Loeber permission to go on a part-time rotation. (12M ¶¶ 87-88, 91-92; Loeber Aff. ¶ 9-10; Def. Exs. 11, 77, 78) On September 28, 1987, Dr. Vakharia wrote Dr. Loeber, thanking her for that permission. (12M ¶ 89; Def. Ex. 77) Dr. Vakharia later testified that she was grateful because she could spend more time with her family. (Vakharia. Dep. at 430-31, 463-69)

In January 1988, Dr. Loeber adopted new case assignment criteria. The "senior" anesthesiologists would receive more sophisticated or high-risk anesthesiology cases, and the "junior" anesthesiologists would receive less complicated cases, until they demonstrated competence in high-risk cases. (12M ¶ 94-95; McCormick Aff. ¶ 35; Loeber Aff. ¶ 11; Trans. at 1667-70, 1803-1804; Def. Ex. 15.) The new assignment guidelines did not affect any physician's staff privileges. (12M ¶ 97; Loeber Aff. ¶ 12; Def. Ex. 15.) Of the three anesthesiologists Dr. Loeber designated "senior", one was a woman and one was an Asian-born and educated male. (SA2 ¶ 146; 12M ¶ 5)

In June 1988, Dr. Vakharia asked that she be restored to full-time status as a senior anesthesiologist. (12M ¶ 102; Loeber Aff. ¶ 14) Dr. Loeber denied the request, explaining that the caseload would not support another full-time anesthesiologist at the junior or senior level, and Dr. Vakharia had not shown sufficient proficiency in more complex cases. (12M ¶¶ 103-104; McCormick Aff. ¶ 34; Loeber Aff. ¶ 14; Borenstein Dep. (DK582) at 105-13) When Dr. Vakharia challenged the decision, Dr. Loeber asked the Quality Assurance Department to compile all occurrence reports involving all Department members. (12M ¶ 105; Loeber Aff. ¶ 16; Loeber Dep. at 711-12; Borenstein Dep. at 105-13) From those reports and prior focus audits, Dr. Loeber

identified 66 cases in which Vakharia had demonstrated inadequate patient care or inadequate monitoring and documentation. (12M ¶ 106; McCormick Aff. ¶ 34; Loeber Aff. ¶ 16; Loeber Dep. at 711-12; Borenstein Dep. at 112-17) Of those 66 cases, all but a few had occurred during Dr. Loeber's tenure as chair of anesthesiology. (12M ¶ 107) Dr. Loeber used objective peer review criteria. (12M ¶ 108; Loeber Aff. ¶ 17; Def. Ex. 79)

On June 7, 1988, Dr. Vakharia asked the Hospital's Medical Executive Committee ("MEC") to restore her to full-time status. (12M ¶ 109; Def. Ex. 12) Dr. Demetrius Trakas, the medical staff president, appointed a task force to review Dr. Vakharia's request. (12M ¶¶ 113-114; Def. Ex. 13; Trakas Dep. at 9-10, 14, 86-87; Vakharia Dep. at 574-77, 586-88, 597-99) The task force recommended that the MEC defer to Dr. Loeber's judgment and affirm her decision to deny Dr. Vakharia's request to return to full-time status. (12M ¶ 117-118; McCormick Aff. ¶ 37; Loeber Aff. ¶ 19; Def. Ex. 17) The task force determined that Dr. Loeber, as chair, was best qualified to assign cases and to evaluate the skills of the anesthesiologists. (*Id.*) The MEC adopted that recommendation. (12M ¶ 119; McCormick Aff. ¶ 38; Loeber Aff. ¶ 20; Trakas Dep. Ex. 18; Vakharia Dep. at 599.) It took no position on quality of care issues, but voted to retain an anesthesia consultant to review the department. (12M ¶ 120; McCormick Aff. ¶¶ 37-38; Loeber Aff. ¶ 20; Trakas Dep. at 139-40; Trakas Dep. Ex. 18)

The Hospital retained the American Society of Anesthesiologists ("ASA"). The ASA is an independent association of anesthesiologists that conducts on-site audits of anesthesia care at hospitals through its "On Site Consultation Program." The program's aim is to provide a

"careful, unbiased and objective means" of evaluating the competence of anesthesiologists. (12M ¶ 133; Def. Ex. 27; Blancato Dep. (DK579) Ex. 7) Dr. Vakharia agreed to a review by the ASA. (12M ¶ 135; McCormick Aff. ¶ 46; Loeber Aff. ¶ 23; Def. Ex. 19)

In November 1988, Dr. Trakas wrote the ASA asking that it review the Anesthesiology Department and make recommendations on three issues: (i) whether there was an anesthesiologist surplus; (ii) whether there were quality of care issues with specific anesthesiologists; and (iii) the department's structure. (12M ¶ 136; Def. Ex. 28) The ASA accepted, assigning Drs. Ronald Wender and Louis Blancato to the ASA on-site team. (12M ¶¶ 137-38; Def. Exs. 34, 31) Dr. Wender was co-chair of the anesthesiology department at Cedar-Sinai Medical Center in Los Angeles. (12M ¶ 139; Def. Ex. 32) Dr. Blancato was a former president of the ASA. (12M ¶ 140; Def. Ex. 33) The Hospital played no role in selecting either reviewer, and neither reviewer knew Dr. Loeber or Dr. Vakharia. (12M ¶¶ 141-43; McCormick Aff. ¶ 51; Loeber Aff. ¶ 26; Blancato Dep. at 69, 234)

In advance of the site visit, Dr. Wender asked the Hospital to send several items of information including: (i) randomly selected charts on any anesthesiologist who had major complications; and (ii) charts on any major complication. (12M ¶ 146; Def. Ex. 37; Wender Dep. (DK580) at 178-82) Dr. Loeber assisted in selecting material to be sent to Dr. Wender. (12M ¶ 147; Loeber Aff. ¶ 25) Of the 66 Vakharia cases she had reviewed, she identified 17 as reflecting "major complications." (*Id.*) In March and April 1989, the Hospital's Director of Legal Affairs, Judith Borenstein, sent Dr. Wender the information he requested. (12M ¶¶ 150-52; Def. Exs. 38, 39, 41; Wender Dep. Exs. 11,

12, 13, 14; Wender Dep. at 231-33; Borenstein Dep. Ex. 6.) In all, the Hospital sent the ASA more than 200 cases involving all anesthesiologists, including 43 cases in which Vakharia experienced major complications and 24 cases selected randomly. (12M ¶ 153, McCormick Aff. ¶ 59; Borenstein Dep. Ex. 6) Ms. Borenstein also sent 18 cases of other anesthesiologists at Dr. Vakharia's request. (12M ¶ 152; Def. Ex. 41) Dr. Vakharia was shown all of her charts sent to the ASA. (12M ¶ 154; McCormick Aff. ¶ 60; Trans at 936-37, 1139-40, 2887-88) Also, Dr. Vakharia was permitted to submit 220 pages of material to Dr. Wender, some of which allegedly concerned complications involving other anesthesiologists. (12M ¶ 156; Vakharia Dep. at 772-77, 839-42, 856-59)

Dr. Wender spent two days at the Hospital and Dr. Blancato spent a day and a half there, reviewing documents and interviewing staff. (12M ¶ 157) Dr. Vakharia was interviewed three different times. (12M ¶ 158) Dr. Wender personally observed Vakharia in the operating room. (ASA Report at 5) Drs. Wender and Blancato reviewed approximately equal numbers of randomly-selected records for each anesthesiologist. (12M ¶¶ 160-61; Trans at 191-92, 195-97, 270-77, 315-21, 1288, 1321) The ASA submitted its independent report on the Anesthesiology Department in June 1989. (12M ¶ 163; ASA Report) The Hospital did not communicate with Dr. Wender, Dr. Blancato or anyone at the ASA while the report was prepared. (Vakharia Dep. at 863-65)

With respect to Dr. Vakharia, the ASA Report documented serious deficiencies in her care and concluded that her medical staff privileges should not be renewed. The report made similar recommendations with respect to the two other anesthesiologists who had been restricted to "junior" status by Loeber. (ASA Report at 15; Wender Aff. ¶¶ 3-6)

The report stated, in pertinent part:

> The consultants reviewed incident reports and records involving patients of all anesthesiologists in the department. There were some very serious complications attributable to substandard care delivered by Drs. Vakharia, [ ] and [ ]. These complications were indicative of a poor quality of anesthesia care, rather than a complication which one would expect as a natural result of the type of anesthesia and/or surgery involved.
>
> Anesthetic records indicate that Dr. Vakharia and Dr. [ ] have far more trouble intubating patients than does Dr. [ ] or other members of the Department. There were multiple cases involving difficult airway management and traumatic intubations. One such case of Dr. Vakharia involved esophageal perforation, pneumothorax, and extensive subcutaneous emphysema.

* * *

The most consistent and most damaging problem area for the three anesthesiologists was in the area of management of ASA Class III and IV patients. Where it was obvious that significant invasive monitoring was necessary on this category of patients (severe congestive failure, cardiac disease, etc.), this generally was either not done or was poorly accomplished.

* * *

> In Class III and IV patients anesthetized by Dr. Vakharia, there was a consistent problem with preoperative evaluation and with fluid management. . . . While major catastrophic events did not occur in many of these cases, this is certainly consistent with the general impression gained by the consultants that she "dumped" patients in the recovery room.

(*Id.* at 11-12)

Upon receiving the ASA Report, Dr. Trakas, the President of the Medical Staff, and Dr. James McCormick, the Hospital President, agreed that the staff privileges of Dr. Vakharia and the other two anesthesiologists should be summarily suspended under the Bylaws. (12M ¶ 171; McCormick Aff. ¶ 65) Drs. Trakas and McCormick agreed that each physician should first have an opportunity to take a leave of absence to consider whether to resign or accept summary suspension. (12M ¶ 172; McCormick Aff. ¶ 65) Dr. Vakharia elected not to resign, and on July 31, 1989, her privileges were summarily suspended by Dr. McCormick, with Dr. Trakas's concurrence. (12M ¶ 174-175; McCormick Aff. ¶ 68; Def. Ex. 46) On August 24, 1989, Dr. Vakharia formally requested a hearing under the Bylaws. (12M ¶ 182) On September 1, 1989, the Hospital sent Dr. Vakharia a notice of hearing that itemized the reasons for the summary suspension. (12M ¶¶ 183-84)

The hearing committee members were appointed by Dr. Trakas pursuant to the Bylaws. (12M ¶ 217) The committee consisted of Drs. Garry Melnick, Miguel Oviedo, Alan Rogin, Jerrold Shapiro and Joseph D'Silva. (Comm. Report) None of the aforementioned individuals was an

anesthesiologist or competed with Dr. Vakharia. (12M ¶ 188) In fact, Dr. Oviedo had previously written a letter supporting Dr. Vakharia. (12M ¶ 189)

Before the hearings began, the committee asked the parties to submit written positions on the proper scope of the hearing by October 16, 1989. (12M ¶ 194; Rogin Aff. ¶ 4; Shapiro Dep. (DK585) at 244-48, 267; Oviedo Dep. (DK586) at 105-106; Def. Exs. 52-53; Rogin Dep. (DK584) at 87-93, 108-10) The Hospital complied, but Dr. Vakharia and her counsel did not. (12M ¶¶196-97; Rogin Aff. ¶ 5; Shapiro Dep. at 279) On October 19, the committee voted to limit the scope of the hearing to the issue of whether the summary suspension was proper. (12M ¶ 198; Def. Ex. 54) It also voted to allow attorneys to attend the hearing in an advisory capacity only. (12M ¶ 199; Def. Ex. 54) The committee chose as its hearing officer Michael Hannafan, an independent attorney nominated by the Hospital. (12M ¶ 211)

The hearings began on November 3, 1989. The committee held 19 days of hearings. It compiled a 3,130-page record and received 38 exhibits from the Hospital and more than 200 from Dr. Vakharia. (12M ¶¶ 218-19) The Hospital presented four witnesses, and Dr. Vakharia presented 21, including two purported experts. (12M ¶¶ 220-21; Trans. at 1-3130) Dr. Vakharia refused to testify on her own behalf. The Hospital thus required her to submit to cross-examination, as the Bylaws provided. (12M ¶ 221; McCormick Aff. ¶ 76; Rogin Aff. ¶ 15) Janis Anderson, the Hospital's manager of quality assurance/risk management, testified on the process for selecting case records submitted to the ASA review team. (12M ¶¶ 222-23; Trans. at 31-74, 67-68; Def. Ex. 37)

Dr. Wender then testified that: (i) he and Dr. Blancato reviewed the entire Anesthesiology Department; (ii) he and Dr. Blancato received and reviewed all information in the medical charts, not just the face sheets prepared by Dr. Loeber; (iii) he personally discussed each of Dr. Vakharia's cases with her at length, but was dissatisfied with her answers; (iv) he and Dr. Blancato received and reviewed more than 200 pages of materials from Dr. Vakharia; and (v) he and Dr. Blancato prepared the ASA report without any consultation by the Hospital. (12M ¶¶ 224-25; Trans. at 177-86, 184-97, 262-65, 270-77, 315-21) Dr. Wender testified that in many, but not all, cases Dr. Vakharia did not meet the national minimum standards of care. (12M ¶ 228-229; Trans. at 201-34, 311-13, 321-22, 348-50) The committee permitted one of Dr. Vakharia's attorneys to cross-examine Dr. Wender on the procedures used during the ASA review. (12M ¶ 226; Trans. at 236-277) Dr. Loeber then testified on each category of problems she had identified in Dr. Vakharia's care. She explained that Dr. Vakharia: (i) had difficulty intubating patients; (ii) inappropriately managed obstetrics patients, particularly high-risk patients; (iii) poorly handled ASA class III and IV (seriously ill) patients; (iv) performed poor airway management and over-narcotized; (v) poorly introduced regional anesthesia; and (vi) maintained improper and deficient documentation. (12M ¶ 234; Trans. at 567-850) Dr. Vakharia was permitted to cross-examine Dr. Loeber at length. (12M ¶ 235; Trans. at 979-1116)

During his initial testimony and on cross-examination by Dr. Heller, one of Dr. Vakharia's experts, Dr. Wender generally discussed the problems he had identified with Vakharia's care. (12M ¶ 236; Trans. at 310-20, 344.) Dr. Vakharia demanded that he return to be cross-examined

on the details of her cases. (12M ¶ 237; Trans. at 360) The committee asked that Dr. Wender return from Los Angeles for another day of more case-specific testimony. (12M ¶ 238; Trans. at 360-65) Dr. Wender agreed and spent over 30 hours reviewing Dr. Vakharia's cases. (12M ¶ 241; Trans. at 1154-64)

To assist Dr. Vakharia, the hearing committee again told Dr. Vakharia she could have her expert cross-examine Dr. Wender on the cases. (12M ¶ 239; Trans. at 1125) She declined and she refused to address her cases at all. Instead, she spent six hours examining Dr. Wender on procedural details that had been covered previously. (12M ¶¶ 242-43; Rogin Aff. ¶ 20; Trans. at 1152-1375) The hearing committee repeatedly asked Dr. Vakharia to concentrate on cases, but she refused. (12M ¶ 244; Rogin Aff. ¶ 20; Trans. at 1176-77, 1200-1203, 1218, 1273-74, 1280, 1290, 1352)

Dr. Floyd Heller, one of Dr. Vakharia's purported experts at the hearing later submitted an affidavit in support of her summary judgment motion. (SA 8) In that affidavit, filed five years after the peer review process had ended, Dr. Heller took exception with many of Dr. Loeber's criticisms of Dr. Vakharia's care. However, Dr. Heller questioned only a handful of the points raised by Dr. Loeber during the actual peer review hearing and did not return to the hearing to cross-examine Dr. Wender on the details of Dr. Vakharia's cases. (Trans. at 2503-2584, 2759-60; 12M ¶¶ 261-62; Rogin Aff. ¶ 25) Dr. Heller's direct testimony at the hearing was not case-specific. (12M ¶ 251; Rogin Aff. ¶ 25; Trans. at 2503-2584) He generally defended Dr. Vakharia, but conceded for example that her use of a 22-gauge needle in an epidural procedure fell below the standard of care, and also testified that poor preoperative charting and failure to conduct

physical examinations was not proper anesthesia practice. (12M ¶¶ 253-54; Trans. at 2537, 2564-67) Dr. Heller left before the Hospital could begin cross-examination and declined to return. (12M ¶ 259; Rogin Aff. ¶ 25) Dr. Vakharia's other purported expert at the hearing, Dr. O'Brien, testified regarding some of the cases reviewed by the ASA. (12M ¶ 255, Trans. at 2597-2760) Like Dr. Heller, Dr. O'Brien had to leave after less than an hour of cross-examination and did not return for additional testimony. (12M ¶ 260; Trans. at 2725-60) Dr. Vakharia's other witnesses were not experts and generally had not reviewed the charts.

After the hearing, the committee issued a six-page opinion recommending that the summary suspension be upheld. The opinion found:

(i) Dr. Wender was "extremely well qualified, neutral and objective";

(ii) The committee was troubled by the fact that Dr. Vakharia "steadfastly avoided asking Dr. Wender questions about her several cases he specifically examined";

(iii) Dr. Vakharia appeared to be incapable of accepting criticism and incapable or unwilling to address noted deficiencies in her practice;

(iv) The committee "was troubled by Dr. Vakharia's unfounded, continual and, at times, hysterical charges of prejudice and other evil motives in response to criticism";

(v) "None of Dr. Vakharia's witnesses effectively rebutted the compelling testimony of Dr. Wender or Dr. Loeber."

(Comm. Report)

The MEC adopted the committee's recommendation on May 9, 1990. (Def. Ex. 69) On May 16, Vakharia exercised her right to have the Hospital Board review the decision. (Def. Ex. 70) The Hospital Board appointed a six-member appellate committee, none of whom were involved in prior proceedings. (12M ¶ 268; McCormick Aff. ¶ 84) Dr. Vakharia and the Hospital submitted written position statements. (12M ¶¶ 269-70; Def. Exs. 72, 73)

On September 7, 1990, the appellate committee issued a 21-page opinion addressing each of Dr. Vakharia's 25 points on appeal and recommended that the Board adopt the MEC decision. (12M ¶ 274-275; Def. Ex. 74.) On September 13, 1990, the Board unanimously affirmed the permanent suspension of Dr. Vakharia. (12M ¶ 276-77) The Hospital President, Dr. McCormick, did not participate in the deliberations. (12M ¶ 278; McCormick Aff. ¶ 90)

REASONS FOR DENYING THE WRIT

A. This Court Should Deny The Writ On The First Question Presented Because The Court Of Appeals Applied The Correct Standard To The Undisputed Facts Of This Case And That Decision Is Not In Conflict With Other Circuits.

Dr. Vakharia's first question presented is based on the erroneous premise that the courts below evaluated the honesty of the peer review committee's decision to terminate Dr. Vakharia's staff privileges solely on the evidence adduced at the ad hoc hearing. (Pet. 15-18) The courts below did not take such a myopic approach but instead carefully reviewed the entire record, including Dr. Vakharia's unsupported accusations of bias, procedural irregularities and discriminatory animus, and correctly ruled that the decision of the peer review committee — the primary decision-maker in this case — was genuine rather than pretext for discrimination. As set forth more fully below, the first question presented is based on a misreading of the opinions and factual record below, and therefore, presents no important question of federal law that warrants this Court's review.

In an employment discrimination case, the plaintiff is required to show either direct or indirect evidence of discrimination. *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *Bruno v. Crown Point*, 950 F.2d 355, 261 (7th Cir. 1991), *cert. denied*, 505 U.S. 1207 (1992). Since Dr. Vakharia relied on indirect evidence, the Court of Appeals properly applied "the familiar burden-shifting method established by *McDonnell-Douglas* . . . and progeny." (Pet. App. 11-12) Under the *McDonnell-Douglas* approach, the plaintiff must establish a prima facie case of

employment discrimination. If the plaintiff establishes a prima facie case, then the employer must articulate a legitimate, non-discriminatory reason for its decision. If the employer does so, the burden shifts back to the plaintiff to prove that the employer's proffered reason was pretextual. *McDonnell-Douglas,* 411 U.S. at 801-04. The plaintiff bears the ultimate burden of demonstrating an impermissible motive or intent. *See St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506-07 (1993).

The parties framed Dr. Vakharia's discrimination claims in terms of pretext. (Pet. App. 13) Since the Hospital asserted that it terminated Dr. Vakharia's staff privileges because "her care was substandard and harmful to her patients," the Court of Appeals correctly determined that the issue was "whether the ad hoc peer review committee — the primary decision maker in this case — genuinely believed that the care [Dr. Vakharia] provided was inferior." (Pet. App. 13-14, 16) Dr. Vakharia had the burden on summary judgment to come forward with evidence to show the Hospital's explanation was not genuine or worthy of credence. (Pet. App. 14)

Stripped of hyperbole, Dr. Vakharia's Petition asks this Court to review the opinion below because she claims the Court of Appeals disregarded her alleged evidence of pretext. That alleged evidence consists of: (i) the peer review committee's decision to limit the scope of the peer review hearings to Dr. Vakharia's own quality of care, rather than her allegations of discrimination or the quality of care provided by other department anesthesiologists; and (ii) unsupported suggestions of bias and irregularities in the hearing process (and the prior ASA review). The Court of Appeals fully considered the record below — including her "evidence" — and correctly ruled that Dr. Vakharia "failed

to show that [the Hospital's] explanation for suspension of her privileges — that the quality of her care was substandard — was less than honest." (Pet. App. 19)

First, there is no evidence that the peer review committee excluded Dr. Vakharia's discrimination charges or prohibited comparative chart analysis to "immunize itself and its decisions from attack by a screen of plausible denial" as Dr. Vakharia suggests. (Pet. 17) The committee voted to limit the scope of the hearing to her quality of care only after it requested that the parties, including Dr. Vakharia, submit written positions on the proper scope of the hearing. The Hospital complied, but Dr. Vakharia and her counsel did not. (*See supra* at 9.) Indeed, the peer review committee had no obligation to review anybody other than Dr. Vakharia in the first place.

While Dr. Vakharia complains that she was denied the opportunity to compare her cases to the work of other anesthesiologists at the Hospital, nothing precluded Dr. Vakharia or her experts from reviewing any record of her choosing with Dr. Wender (or Dr. Loeber) and taking issue with him at the hearing on the adequacy of Dr. Vakharia's care in that specific case based on national or even community standards of care. Expert witnesses in medical malpractice cases are routinely asked to give an opinion on whether the defendant physician or hospital met the requisite standard of care without the type of chart by chart comparative analysis requested by Dr. Vakharia. Instead, as the Court of Appeals recognized, Dr. Vakharia and her expert sandbagged the Committee and the Hospital by refusing to address her cases at all. (Pet. App. 16-18)

The record fully supports the Court of Appeal's conclusion that neither Dr. Vakharia nor her experts addressed the "heart

of SCH's evidence, namely, the numerous specific cases." (Pet. App. 17) For example, when one of the Hospital's witnesses, Dr. Wender, returned from Los Angeles (at Dr. Vakharia's request) for another day of case-specific testimony, Dr. Vakharia declined the committee's invitation to have an expert cross-examine Dr. Wender and refused to address the cases at all. Instead, Dr. Vakharia wasted six hours, from about 2:00pm to 8:00pm, examining Dr. Wender on procedural issues that had been covered previously. The committee repeatedly asked her to concentrate on cases, but she refused. (*See supra* at 12-13) In sum, Dr. Vakharia's focus on "comparative" evidence is not important enough to warrant this Court's scrutiny because the mere fact that the peer review committee refused to allow such evidence does not alone create a genuine issue of fact undermining the honesty of the peer review committee's decision.

Second, further demonstrating that the Court of Appeals did not act with blinders on, it considered, and then correctly concluded that the Hospital granted Dr. Vakharia "all the procedural safeguards generally associated with an internal peer review process" and that Dr. Vakharia failed to "point to any direct evidence of bias." (Pet. App. 19-20) Dr. Vakharia suggests that certain unidentified surgeons on the peer review committee were biased because their quality of care was also at issue, but there is no admissible evidence to support that accusation. Notwithstanding years of scorched-earth discovery in the trial court, Dr. Vakharia never established any evidence of actual bias on the part of any member of the peer review committee or the committee's counsel, despite her repeated, unsupported suggestions to the contrary.

Dr. Vakharia makes a host of other factual misstatements in a final effort to show the process was tainted. For example, she claims that Dr. Loeber selected all of the ASA cases even though she submitted charts and other material to the ASA. She also claims she only had only four days to put on her case. In addition to the time allotted for her case, Dr. Vakharia had the opportunity to cross-examine the Hospital's witnesses, including an additional day with Dr. Wender. And her main expert, Dr. Heller, declined the committee's invitation to return for another day of testimony. (SA8 ¶ 33) Whereas Dr. Wender flew back from Los Angeles for another day of testimony, Dr. Heller, who practices in Chicago, admitted that he did not attempt to "rearrange [his] schedule or request any further dates." (SA8 ¶ 33)

Finally, demonstrating that the Court of Appeals did not confine its review to the events in the peer review proceeding, the Court considered Dr. Vakharia's charges of direct discrimination. For example, while Dr. Vakharia boldly refers to the "racist remarks" in her petition, the Court of Appeals correctly concluded that all of the remarks of Drs. Loeber and McCormick, "which are in the nature of stray remarks," did not constitute direct evidence of discrimination. (Op. at 10 n.7) Moreover, the comments of Dr. Loeber and Dr. McCormick are not even relevant to the pretext analysis because liability will not attach "when the ultimate decision is clearly made on an independent basis." *Willis v. Marion County Auditor's Office*, 118 F.3d 542, 547 (7th Cir. 1997).

The Court of Appeals' pretext analysis is not in conflict with *Bolt v. Halifax Hospital Medical Center*, 891 F.2d 810 (11th Cir.), *cert. denied*, 495 U.S. 924 (1990); *Miller v. Indiana Hospital*, 843 F.2d 139 (3d Cir. 1988), *cert. denied*, 488 U.S. 87 (1990); or *Brown v. Presbyterian Health Care Service*, 101 F.3d 1324 (10th Cir. 1996), *cert. denied*,

520 U.S. 1181 (1997). *Bolt*, *Miller* and *Brown* are antitrust cases, not employment discrimination cases, and, therefore, they cannot present a conflict among the Circuits in discrimination cases.[2] Because they are not discrimination cases, these courts, in considering the evidence, did not apply a pretext analysis. Moreover, unlike here, in *Bolt* and *Miller* the physicians had evidence of dishonesty, including direct financial conflicts of interest among members of the peer review committees. *Bolt*, 891 F.2d at 817; *Miller*, 843 F.2d at 144. *Brown* involved a claim of immunity under the Health Care Quality Improvement Act, 42 U.S.C. §§ 11111(a), 11112(a) (1994), an alternative basis to affirm summary judgment in this case.

B. The Writ Should Be Denied On The Second, Third And Fourth Questions Presented Because The Court Of Appeals Fully Considered The Issues and Properly Decided That The District Court Did Not Abuse Its Discretion.

In her second, third and fourth questions presented, Dr. Vakharia complains that she was improperly denied discovery, denied leave to amend her complaint and that the Court of Appeals failed to consider her conclusory 12M statement. The Court of Appeals fully considered each issue and correctly decided that the District Court did not abuse its discretion. None of these discretionary rulings raise any issues important enough to warrant exercise of this Court's supervisory authority.

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2. Dr. Vakharia's attempt to incorporate the arguments set forth in her Petition for Rehearing and Suggestions for Rehearing en Banc violates Rule 14.2 and, therefore, should not be considered.

The District Court acted within its discretion to deny Dr. Vakharia's discovery requests, particularly in view of the extensive discovery Dr. Vakharia had already requested. The court permitted Dr. Vakharia to depose all the affiants in support of the defendants' motion for summary judgment, the members of the peer review committee, as well as a host of other witnesses, including Drs. Wender and Blancato under Rule 56(f) of the Federal Rules of Civil Procedure. In three well-reasoned opinions, the district court concluded that Vakharia had already spent "an immense amount of time" with key witnesses on matters of "marginal relevancy," the depositions of Dr. Vacanti and Mr. Scott were largely irrelevant to the issues in this litigation" and "[t]he unsupported possibility that [ASA reports on other hospitals] might turn up something does not justify either the inevitable intrusion into confidential matters nor the resultant expansion of discovery." (Resp. App. 3a, 14a-15a; A69) Indeed, the District Court reviewed the ASA Report Dr. Vakharia obtained on another local hospital and found no support for her claims of an ASA program to eliminate foreign born anesthesiologists.

Similarly, the district court did not abuse its discretion in denying Dr. Vakharia's motion for leave to file a fourth amended complaint to add state law claims for defamation, false reporting and commercial disparagement on the grounds of undue delay and substantial prejudice to defendants. *See* Fed. R. Civ. P. 15. (A47-52) Judge Moran concluded that her proposed fourth amendment coming at the close of voluminous discovery, on the eve of rulings on dispositive motions, and nearly three years after the case was filed would unfairly prejudice the defendants and unduly complicate the case. Judge Moran noted that "this is a 1990 case that has been a pleading war." (A49) The proffered amendment would substantially increase the scope of the lawsuit at a time when

Dr. Vakharia "should not be multiplying theories but getting ready to deal with the merits of the case." (A50)

Dr. Vakharia suggests in her statement of the case that leave should have been granted because she did not learn the Hospital reported her termination to others until late in discovery, and the reports filed by the hospital exaggerated the circumstances of her termination. (Pet. 13-14, 18) There is no support in the record for Dr. Vakharia's statement that the report exaggerated the circumstances of her termination and therefore the District Court judge aptly commented that the new claims were "just more roads leading to Rome." (A49) In other words, if Vakharia succeeded in proving that she was terminated for discriminatory and anticompetitive reasons, false reports would be an element of her damages for discrimination and additional antitrust injury. If she failed to show pretext or anticompetitive motivation, then reporting her termination for substandard care was not defamatory, false or disparaging.

Finally, the District Court and Court of Appeals properly disregarded portions of Dr. Vakharia's 106 page, 566 paragraph 12M statement (her second statement of alleged factual assertions), her affidavit and other supporting documents because they are replete with hearsay, self-interested conclusions and unsupported fact assertions. Perhaps recognizing the correctness of the lower court's decision, Dr. Vakharia fails to even address the findings that her submissions lacked the requisite evidentiary foundation. Since review of the District Court's application of its own local rules will not affect other circuits, this question is particularly inappropriate for review. In sum, Dr. Vakharia has offered nothing to justify this Court's exercise of supervisory authority to review any of the foregoing discretionary decisions.

C. This Court Should Deny The Writ On The Fifth Question Presented Because Dr. Vakharia Did Not Raise The Issue Below And, In Any Event, The Court Of Appeals' Decision Is Consistent With This Court's Recent Opinions.

Dr. Vakharia asserts that it was wrong for the Court of Appeals to apply common law agency principles to determine whether she was an employee of the Hospital for purposes of Title VII and ADEA. The District Court, relying on *Alexander v. Rush North Shore Medical Center*, 101 F.3d 487 (7th Cir. 1996), *cert. denied*, 522 U.S. 811 (1997), held that Dr. Vakharia's Title VII and ADEA claims were barred because she was an independent contractor, not an employee or applicant for employment. In *Alexander,* the Court of Appeals applied a five factor common law test to determine that an anesthesiologist was not an employee under Title VII. Although the District Court invited Dr. Vakharia to address "any argument that the decision in *Alexander* is erroneous" to the Court of Appeals, she failed to do so. (Pet. App. 25) Instead of asking the Court of Appeals to overrule *Alexander*, Dr. Vakharia argued that "the high-degree of control [the Hospital] exercised over the minutiae of quality of care distinguishes this case from *Alexander*." (Br. at 17.) In other words, Dr. Vakharia merely argued that the Hospital in this case exercised sufficient control to deem her an employee under the Seventh Circuit's common law control test. In her Petition for Rehearing En Banc, Dr. Vakharia did not even mention her Title VII or ADEA claims. (Pet. App. 60-67) Since Dr. Vakharia did not urge the Court of Appeals to overrule *Alexander* or even argue that it was inconsistent with any statute or court decision, she waived her argument before this Court.

But even if Dr. Vakharia did not waive the issue, the Court of Appeals decision is in line with this Court's opinions in *Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318 (1992) and *Community for Creative Non-Violence v. Reid*, 490 U.S. 730 (1989). In *Darden*, this Court adopted a similar common law control-oriented agency test to determine whether an individual is an employee under the Employee Retirement and Income Security Act ("ERISA"). This Court found that ERISA's definition of "employee" as "any individual employed by an employer" is "completely circular and explains nothing." *Id.* at 323. It further found nothing in the Act to suggest that construing the term employee "to incorporate traditional agency law principles would thwart the congressional design or lead to absurd results." *Id.* In rejecting the lower court's reliance on *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111 (1994) (cited by Dr. Vakharia), this Court concluded that in *Reid* it had abandoned its prior emphasis on construing the term "employee" "in light of the mischief to be corrected and the end to be attained" under both the National Labor Relations Act and Social Security Act. *Id.* Since Title VII and ADEA define "employee" in the same circular manner as ERISA, the Court of Appeals' use of a common law test in this case was consistent with *Darden* and *Reid*.

The Court of Appeals' decision is plainly not in conflict with this Court's decision in *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1996) as Dr. Vakharia suggests. (Pet. 22-23) In *Robinson*, this Court held that the anti-retaliation provision of Title VII applies to former employees. It did not address whether or not Title VII or ADEA applies to independent contractors. The Seventh Circuit Court of Appeals' decision in *Alexander* and in this case below followed this Court's precedent in *Darden* by utilizing a common law agency

definition to define employee. In *Darden*, this Court rejected the "economic realities" test set forth in *NLRB v. Hearst Publications* as "feeble precedent for unmooring the term [employee] from common law." *Darden*, 112 U.S. at 323. Moreover, this case is not the appropriate one to address the issue because even if Dr. Vakharia has standing, summary judgment on the merits would stand based on the Court of Appeals' decision in connection with her Section 1981 claims.

CONCLUSION

Wherefore, for the foregoing reasons, Respondents respectfully request that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION DATED SEPTEMBER 14, 1993

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

No. 90 C 6548

USHA VAKHARIA, M.D.,

Plaintiff,

vs.

SWEDISH COVENANT HOSPITAL, et al.,

Defendants.

MEMORANDUM AND ORDER

A number of motions are now pending before this court and fully briefed. The first is a motion of The American Society of Anesthesiologists (ASA) for a protective order to prevent disclosure of ASA consultation reports at fifteen other hospitals in the survey of which Dr. Charles J. Vacanti and/or Dr. Louis S. Blancato participated. Plaintiff was not related to any of those hospitals. The motion is granted.

As this court has remarked on many occasions, this court has an obligation to manage discovery so as to keep it (or at least attempt to keep it) within reasonable bounds. The reports plaintiff seeks critique the operations of other

hospitals and the professional staffs of those hospitals. They may or may not be subject to a state privilege (we do not reach that), but the hospitals and physicians involved most certainly have a legitimate expectation of privacy, an expectation that the reports will not be disclosed whenever a physician at some other hospital sues that hospital on whatever claims may be advanced. The defeat of those expectations in those circumstances could well reduce the willingness to undergo such evaluations in the future. This court is also mindful that internal reviews of the quality of medical care are to be encouraged. That is the thrust of both federal and state law. Although any state privilege is not conclusive here, we do not believe that we should compel disclosure unless there are significant justifications for doing so. Further, as we earlier explained, we must be mindful of the possible expansion of discovery and proof into at best marginal areas should the reports of other hospitals become part of the factual mix here.

Plaintiff's initial justification is that the other reports might possibly contain language disclosing a discriminatory animus, such as code words. She refers to the report on another hospital of which she does have a copy, and she has attached a copy as an exhibit. She insists that she can delete the names of the physicians discussed therein and somehow still use the report to indicate a pattern and practice of minority physicians being singled out for criticism. In a later filing plaintiff claims that the reports may show racial comments, disclose a different methodology, verify that the ASA may be engaged in "ethnic cleansing," and lend support to the notion that Swedish Covenant Hospital selected ASA to make the report because it knew that it would prepare an unfair report. She uses as an example the report on the other

hospital. Her examples in that report are that in the description of the hospital the 34-page report notes that the hospital serves an area of 80% Hispanic population, has 50% Hispanic physicians and has all foreign medical graduate anesthesiologists, and that staff at the hospital commented that one or more anesthesiologists had some language problems (including the chairman). That is hardly grist for plaintiff's "code word" mill. Indeed, the department chairman is otherwise described as an "ideal chairman," an "aggressive, dynamic leader" who should be given greater authority. Nor can there be any indication of pattern or practice or "ethnic cleansing," or systemic unfairness, without opening up, for all fifteen hospitals, the background and institutional history of every physician, minority and non-minority, discussed in each report. The unsupported possibility that this discovery might turn up something does not justify either the inevitable intrusion into confidential matters nor the resultant expansion of discovery.

The next three motions can be determined without extended analysis. The only confusion arises from the rhetoric engaged in by both sides. A carefully drafted request and a carefully drafted response should obviate the necessity for disputes such as these. The first of these three motions asks for peer review records of Swedish Covenant Hospital anesthesiologists. The responses to that motion and the second motion are that defendants have produced or are producing all documents responsive to the request: "There are no other documents fitting plaintiff's requests." Plaintiff is entitled to production of the documents requested and defendants have responded by representing that they have produced all such documents. The motion to compel is, for now, denied as moot. If plaintiff believes that there are

documents that may be responsive to her request but that defendants have not produced she should so specify in another request.

The second motion of the three seeks Swedish Covenant Hospital to provide letters of reference and governmental reports "Regarding Dr. Vakharia," but in the body of the motion expanded to include all the anesthesiologists. Plaintiff is entitled to those documents. *Memorial Hospital for McHenry County*, 664 F.2d 1058 (7th Cir. 1981). The defendants respond by stating that they have produced "[a]ll of those documents" with respect to governmental reports, and they indicate that they have produced all letters of reference documents. If they have, they should expressly so state. If they have not, they should produce the remaining documents or explain what has not been produced and why.

The third of the three motions asks for more adequate responses to interrogatories from Dr. Wender and Dr. Blancato. Plaintiff's complaint is that the doctors did not specify in detail the information requested. The interrogatories and their answers are reflective of the limitations upon interrogatories as a form of discovery. The doctors were involved in the survey for a limited time over four years ago. The disputes leading to his lawsuit obviously have been very much on plaintiff's mind since then, but that is not so for the doctors. The answers appear to reflect their best recollection at the time they responded. Perhaps they can recall more if they review the transcripts of the ad hoc committee hearing. Perhaps they will have recollections of particular cases upon review of the patient records. Perhaps they will have little or no recollection of particular cases but can now point out the matters that would lead them to certain

conclusions. And perhaps the basis of various opinions are forever erased from memory by the passage of time. Interrogatories are, however, an imperfect vehicle for uncovering layers of memory. The motion is denied.

Finally, we have two motions by plaintiff, one to produce documents designated as Group I and the other designated Group II. As in a previous motion, the parties have engaged in extensive memoranda to indulge in complaints about each other and to argue over "pertinent" and "relevant." From the responses to most of the requests in Group I it seems apparent that defendants have used "pertinent" and "relevant" in the same sense as "responsive to the request," and we will treat them as the same unless defendants specify (as they must do if we are in error) that they used those words in a different sense. We would have thought that any misunderstanding on that matter would have resolved at a 12(k) conference, if not before.

Given this court's perception, only a few of the Group I disputes require consideration. We are not given any reason why Request 26 for minutes of the Credentials Committee for 1985-1987 should not be produced. They should be. 1985 has been benchmark for some matters and it is long before Dr. Loeber appeared on the scene. This court believes there is justification for asking for documents pertaining to modifications or rejections relating to physicians on staff, and we direct that these be produced (Request 17), although the documents are marginal at best. We leave until later our comments on discovery relating to the hospital generally, beyond the anesthesiologists. We understand the responses to Requests 24, 62, 103, 105, 125 and 127 to cover all

documents covered by the requests. If we are in error, defendants have an obligation to so advise. The responses to Requests 52 and 53 are indeed incomprehensible and should be clarified.

The same ground rules apply to Group II documents. *See* Requests 34, 44, 45, 46, 48, 59, 85, 89, 92 and 93. In her reply plaintiff refers to "privilege files." Since we do not understand what those are supposed to be, and defendants have had no opportunity to comment, we deny that request for now. We think that Requests 9, 13, 14, 18 and 19 are too broad both in time period and scope. This case relates to an anesthesiologist, not to physicians generally. We have allowed production relating to any terminations or restrictions, and that is enough. Request 15 is too broad in time period. Defendants are cautioned, however, that they cannot seek to rely on employment information from 1990 unless they are willing to share the related documents for that period. Defendants should respond to Request 22 on the basis of the clarification set forth in plaintiff's reply. We fail to see how the manner of Dr. Saxena's appointment and departure can be germane to anything. Requests 27 and 28 are denied. Finally, we do not know what the parties discussed and agreed upon at the 12(k) conference relating to Request 121, or what would be responsive according to plaintiff's present reading of Request 121 and not yet produced. We therefore defer any ruling.

s/ James B. Moran
JAMES B. MORAN,
Chief Judge, U.S. District Court

Sept. 14, 1993.

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION DATED JUNE 8, 1993

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS EASTERN DIVISION

No. 90 C 6548

USHA VAKHARIA, M.D.,

Plaintiff,

vs.

SWEDISH COVENANT HOSPITAL, et al.,

Defendants.

MEMORANDUM AND ORDER

Before us now are three motions by plaintiff. In her first motion she asks the court to reconsider its ruling dismissing her discrimination claims against several defendants named for the first time in her amended complaints (detailed in count V of her second amended complaint). In her second motion she asks the court to reconsider its dismissal of portions of her antitrust claim (detailed in count VI). In her third motion, submitted pursuant to Fed.R.Civ.P. 56(f), plaintiff asks for leave to conduct depositions of certain individuals prior to responding to defendants' motion for summary judgment. Her first and third motions are granted in part and denied in part. Her second motion is denied.

Appendix B

DISCUSSION

Count V

This court has dismissed plaintiff's Title VII claims against several defendants because plaintiff failed to charge them within the applicable limitations period. *See Vakharia v. Swedish Covenant Hospital*, 90 C 6548, slip op. at 6 (N.D.Ill. March 31, 1993). Invoking the doctrine of equitable tolling, plaintiff argues that she should not be barred from suing the dismissed defendants because they participated in various administrative proceedings at the hospital and thereby misled her into thinking that her medical staff privileges might be restored. Her argument is unpersuasive. Although, as a general rule, the doctrine of equitable tolling is applicable to Title VII cases, *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982), the decision by potential adversaries in a Title VII case to participate in administrative proceedings does not trigger it. *International Union of Electrical, Radio & Machine Workers, AFL-CIO Local 790 v. Robbins & Myers, Inc.*, 429 U.S. 229, 236 (1976); *Lever v. Northwestern University*, 979 F.2d 552, 556 (7th Cir. 1992), *pet. for cert. filed*, 61 USLW 3732 (April 8, 1993).

In its order of March 31, 1993. this court noted that plaintiff's amended complaints were filed within the applicable limitations period to the extent that they alleged a claim under 42 U.S.C. §1981 against members of the hospital's board of directors for impeding plaintiff's efforts to form new contracts with patients. *Vakharia*, 90 C 6548, slip op. Plaintiff now indicates that two defendants who were named in the amended complaints, Arthur Peterson and

Edward Cucci, were dismissed erroneously from count V because she neglected to identify them as board members. Because defendants do not deny that Peterson and Cucci were board members, and because both have received adequate notice of the §1981 claims against them, plaintiff's motion to reconsider must be granted with respect to them. However, plaintiff may proceed under count V against them only to the extent that they may be liable under §1981, along with other named members of the board of directors, for impeding her efforts to form new contracts with patients.

Count VI

In the same memorandum and order this court held that plaintiff could proceed with part of her antitrust claim under section 1 of the Sherman Act. Several distinctions were drawn, however, that significantly restricted the scope of her surviving claim. *Id.* at 17-20. Most of the defendants were dismissed from count VI because they could not be considered co-conspirators, and plaintiff's claim was a conspiracy claim. And, while the portion of the claim based on the hospital's decision to terminate plaintiff was spared, the portions of her claim based on the hospital's other acts, including its establishment of a "multi-tiered" system for assigning patients, were dismissed. Now plaintiff asks the court to allow her to pursue her antitrust claim against all defendants named in the second amended complaint and, in addition, she tentatively seeks permission to pursue an independent antitrust claim based on the multi-tiered system for assigning cases. As this court has indicated, the results plaintiff desires are foreclosed by several Supreme Court and Seventh Circuit decisions (cited in the March 31, 1993

order). Intra-corporate dealings of the sort alleged cannot constitute conspiracies, and claims premised on the restriction of competition within a single hospital are not cognizable under the federal antitrust laws.

Perhaps the hospital's establishment of a multi-tiered system of assigning cases was, as plaintiff says, a "step in the process that culminated in Dr. Vakharia's total loss of privileges." Even if true, however, that fact cannot justify granting plaintiff's motion to reconsider the partial dismissal of count VI, although it might constitute probative evidence concerning her antitrust claim based on the hospital's hindering her efforts to find placement elsewhere. Because trial is a long way away, the court need not resolve that evidentiary issue at this time.

Motion Pursuant to Fed.R.Civ.P. 56(f)

Defendants have filed a motion for summary judgment on the first four counts. That motion is supported by three affidavits, from Dr. James B. McCormick, president of the hospital; Dr. Nancy Loeber, former chairman of the anesthesia department; and Dr. Alan Rogin, chairman of the *ad hoc* hearing committee. The thrust of that motion is that Dr. Loeber was brought in because of concerns about the quality of anesthesiological services, that she performed a performance audit of plaintiff and had concerns about a number of cases, that those concerns were not satisfactorily resolved but in the meantime plaintiff chose to go on part-time status, that thereafter the department was reorganized so as to have senior anesthesiologists for the more serious cases and junior anesthesiologists for the less

serious cases, that (apparently) plaintiff was classified by Dr. Loeber as a junior anesthesiologist, that thereafter plaintiff sought to return to full-time status as a senior anesthesiologist, that Dr. Loeber then determined that the caseload would not support another full-time anesthesiologist in either classification and that plaintiff had not demonstrated sufficient proficiency for "senior" cases, that plaintiff objected, and that led to a review of the performance of Dr. Vakharia and ultimately of the entire department. That review began with Dr. Loeber, who came up with approximately 66 cases of plaintiff's in which Dr. Loeber believed the total care had been in one way or another inadequate. Plaintiff then requested the Medical Executive Committee (MEC) for return to full-time status. The MEC appointed a committee which considered the situation and reported to the MEC. The MEC concluded that another full-time position was not justified, but did not take a position on the quality-of-care issues. It decided, rather, to retain an independent consultant to evaluate plaintiff's work, and later that review was expanded to include the entire department. It was performed by two doctors selected by the ASA and under the auspices of that organization. The review, as it pertained to plaintiff, included 43 cases involving major complications and 24 randomly selected cases, material submitted by plaintiff, and various interviews at the hospital, including extensive interviews of plaintiff. The report, issued in June 1989, included the recommendation that the medical staff privileges of Dr. Vakharia, as well as those of two other anesthesiologists, should not be renewed.

The hospital then gave plaintiff the option of resignation or summary suspension. Since plaintiff did not resign she

was summarily suspended, and that triggered a hearing before an *ad hoc* committee of the MEC consisting of five physicians and a hearing officer. Attorneys were involved, for the most part, only in an advisory capacity. The hearings spanned 17 days and generated 3130 pages of testimony and argument, 38 exhibits from the hospital and over 200 from plaintiff. Dr. McCormick, Dr. Loeber, Janice Anderson and Dr. Wender (one of the ASA reviewers) testified at length, and plaintiff had 21 witnesses. The committee upheld the suspension and the MEC adopted the recommendation on May 9, 1990. That decision was appealed to the hospital's board, which appointed a review committee. That committee reviewed the lengthy submissions and the record and, on September 7, 1990, issued a 21-page report recommending that the MEC decision be adopted by the board, and it did so on September 12, 1990.

We recite the defendants' summary judgment contentions at some length because they have a bearing on the pending motion. Plaintiff wants to take the depositions of at least 19 persons prior to responding to the motion. Defendants do not see why any are necessary but, in any event, they should not extend beyond the three affiants. We begin by noting that plaintiff is entitled to a reasonable opportunity to conduct necessary discovery on her claims prior to responding to the summary judgment motion. At the same time, we note that this court has the obligation, pursuant to Rule 26, to control discovery so that it is not unduly burdensome and expensive. That obligation has been increasingly emphasized of late and concerns about discovery abuse underlie both the Civil Justice Reform Act direction that district courts adopt plans and the proposed amendments

to the Federal Rules of Civil Procedure. Those proposed amendments, specifically Rule 30, would establish a maximum of ten depositions by a party as the norm for civil cases and that a witness once deposed should not normally be deposed again. Here the plaintiff seeks 19 depositions just for starters, including depositions of witnesses who were questioned at length in the *ad hoc* committee hearing. It is an ambitious program to depose virtually everyone who had or may have had some relationship to the process during which plaintiff's practice was curtailed and (considerably more significant in terms of the amount in controversy) thereafter suspended. And it goes too far in light of the position advanced by the defendants and the rather weak justifications advanced by plaintiff.

The motion relates primarily to the employment discrimination claims. Defendants say that plaintiff's troubles up to the suspension time stem from decisions made by Dr. Loeber. Janice Anderson was, it appears conceded, involved in securing information leading up to some of those decisions. Dr. McCormick was also knowledgeable about that period. Dr. Loeber and Dr. McCormick are affiants and plaintiff may depose them, but with due regard for the fact that they previously testified before the *ad hoc* hearing committee. Janice Anderson also testified there and plaintiff has presented no substantial reason why she must be questioned again. Plaintiff has presented no substantial reason to question that Dr. Loeber was the ultimate decisionmaker during that period or that others tainted the information upon which Dr. Loeber claimed she replied. We therefore see no reason to depose Karen Filopowski at this time. Dr. McCormick was familiar with hospital needs during

that period. Judith Borenstein participated in the May 7, 1988 discussion of needs and assisted in providing information for the ASA review. We think plaintiff is entitled to depose her, but we are unconvinced that there is sufficient justification, for now, to take the depositions of Dr. Paulissian (who, after all, testified for plaintiff before the *ad hoc* committee) regarding the May 7, 1988 meeting or for any other purpose.

Plaintiff seeks the depositions of Dr. Blancato, Dr. Vacanti and Dr. Wender. Defendants contend that the ASA report was a significant matter in the ultimate suspension. Plaintiff is entitled to depose Dr. Blancato. We are not persuaded that the deposition of Dr. Vacanti is needed. He may have appointed the other two to be the surveyors, but the issues here relate to Dr. Vakharia, not ASA in general. Plaintiff has already, apparently, explored general procedures in her questions to Dr. Wender at the *ad hoc* committee hearing, and those can be explored adequately with Dr. Blancato as well. We do, moreover, permit the deposition of Dr. Wender. Defendants contend that plaintiff deliberately failed to explore quality-of-care issues with Dr. Wender. Because she was acting *pro se* at the time, we think her attorney is now entitled to make that inquiry.

Five physicians comprised the *ad hoc* committee. One, Dr. RPogin, is an affiant, and his deposition may be taken. She may also depose two of the four others, thus giving her access to a majority of a unanimous committee. We see no reason, however, to depose counsel (Callahan and Scott), absent some compelling evidence that they influenced the result and acted other than as attorneys. Further, if, as plaintiff

claims, Scott prevented her from having witnesses testify she has knowledge about that matter, she can, herself, bring it to the attention of the court, and, if the hearing officer, Hannafan, was unfair, plaintiff can point that out from the 3130 pages of transcript. Finally, we are not persuaded that the depositions of Dr. Shah, Dr. Yelda or Dr. Larson have been reasonably justified.

We are somewhat uncertain how plaintiff is proceeding. Ordinarily depositions are for the purpose of getting information from non-parties or pinning down parties. It is the rare plaintiff who expects the defendants, or those allegedly in league with them, to make the case for her when the charges are of unsavory conduct, unless plaintiff has evidence to present to the defendants that requires an admission. Here the claims are of purposeful discrimination against her, claims that plaintiff has consistently presented for a number of years. To the extent she has personal knowledge of these claims, she can present that evidence by affidavit. To the extent she has evidence from others, she can also present it by their affidavits. Even with such evidence she must still address, now or ultimately, the quality-of-care issues raised by defendants.

Defendants are now scheduled to complete production of documents by June 23, 1993. The permitted depositions should be completed within the following 60 days, or by August 23, 1993. Plaintiff shall file her responsive brief by September 23, 1993 and defendants shall file their reply brief by October 14, 1993.

Appendix B

Liability of Defendants in Their Individual Capacities

At a recent status conference the parties expressed some confusion about the implications of this court's March 31, 1993 order on the personal liability of some of the defendants. Apparently the order requires some elaboration.

As this court noted in its opinion of May 22, 1991, a defendant may be liable under Title VII and §1981 even if the defendant is not the plaintiff's employer. *Vakharia v. Swedish Covenant Hospital*, 765 F.Supp. 461, 463 (N.D.Ill. 1991). The same is true, presumably, of defendants sued under the ADEA, though the issue has not been raised in this case. Under all three statutes, if a defendant discriminatorily impedes a person's access to employment opportunities with third parties, the defendant may be liable. That much follows from the May 22, 1991 memorandum and order. The question the parties now raise is whether such a defendant may be liable in his or her individual capacity when the defendant was acting as an agent for someone else. The answer is yes.

Under the ADEA, Title VII and § 1981, individuals may be held personally liable for civil rights violations they commit while working as agents of larger institutions, provided that their individual liability is based on individual acts distinct from institutional policy set by their superiors. When a manager at a company terminates an employee on account of that employee's race or age, the company is liable,[1] as is the manager, unless the manager's decision was

1. When a private company is involved, the acts of an employee can create §1981 liability for an employer. *See Gatlin v. Jewel Food* (Cont'd)

mandated by company policy set by someone else. Thus, decisionmaking employees who discriminate on the basis of age may be held liable in their individual capacities under the ADEA. *See e.g., Strzelecki v. Schwarz Paper Co.*, 92 C 6668, slip op. (N.D.Ill. May 27, 1993); *House v. Cannon Mills Co.*, 713 F.Supp. 159 (M.D.N.C. 1988); *Price v. Marshall Erdman & Associates, Inc.*, 966 F.2d 320, 324 (7th Cir. 1992) (discussing personal liability of decisionmaker). Decisionmaking employees also may be held liable in their individual capacities under Title VII. *See Bridges v. Eastman Kodak Co.*, 800 F.Supp. 1172, 1180 (S.D.N.Y. 1992); *Robinson v. Jacksonville Shipyards, Inc.*, 760 F.Supp. 1486, 1527 (M.D.Fla. 1991); *Gaddy v. Abex Corp.*, 884 F.2d 312, 318-19 (7th Cir. 1989) (discussing personal liability of decisionmaker); *E.E.O.C. v. Vucitech*, 842 F.2d 936, 942 (7th Cir. 1988) (discussing personal liability of decisionmakers). And decisionmaking employees may be held liable under §1981. *Al-Khazraji v. Saint Francis College*, 784 F.2d 505, 518-19 (3rd Cir. 1986), *aff'd*, 481 U.S. 604 (1987); *Musikiwamba v. ESSI, Inc.*, 760 F.2d 740, 753 (7th Cir.

(Cont'd)

Stores, 699 F.Supp. 1266, 1268-69 (N.D.Ill. 1988); *Montgomery v. Campbell Soup Co.*, 647 F.Supp. 1372, 1378 (N.D.Ill. 1986). However, when a municipal agency is involved, the municipal employee's isolated acts will not subject the municipal employer to liability under §1981 — at least as §1981 existed prior to the Civil Rights Act of 1991 — unless the employee was following established policy. *Jett v. Dallas Independent School District*, 491 U.S. 701, 735-36 (1989); *East v. City of Chicago*, 719 F.Supp. 683, 688 (N.D.Ill. 1989). In other words, under *Jett*, *respondeat superior* claims against municipalities are void under §1981, just as they are void under §1983. *See Monell v. Department of Social Services of City of New York*, 436 U.S. 658, 690-91 (1978).

1985); *Manuel v. International Harvester, Co.*, 502 F.Supp. 45, 50 (N.D.Ill. 1980).

Courts around the country seem to be in complete agreement with respect to personal liability of decisionmaking employees under §1981. As indicated, this court believes that individual defendants should be treated the same way under the ADEA and Title VII as they are under §1981. This court recognizes, however, that other courts have treated ADEA and Title VII defendants differently. For example, in *Miller v. Maxwell's International, Inc.*, 61 USLW 2649 (9th Cir. 1993), the Ninth Circuit held that a supervisor could not be held personally liable under the ADEA for a discriminatory decision made on behalf of an employer corporation. In this district, Judges Duff and Aspen have reached a similar conclusion with respect to Title VII. *See Weiss v. Coca-Cola Bottling Co. of Chicago*, 772 F.Supp. 407, 411 (N.D.Ill. 1991); *Pommier v. James L. Edelstein Enterprises*, 816 F.Supp. 476, 481 (N.D.Ill. 1993). Judge Duff's opinion reflects the reasoning of the courts that have rejected personal liability of corporate agents: the only remedies available under Title VII, he points out, are remedies that "an employer, not an individual, would generally provide."[2] *Id.* While granting the premise, this court respectfully disagrees with the conclusion.

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2. Judge Duff was describing Title VII as it existed prior to the Civil Rights Act of 1991. As noted previously, the 1991 amendments to Title VII and §1981 do not apply to this case. However, if the amendments did apply, Judge Duff's argument would lose virtually all of its force, since the 1991 amendments allow for full compensatory damages — not just back pay — as well as punitive damages. *See Bridges*, 800 F.Supp. at 1180.

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Title VII always has served two purposes: to compensate the victims of discrimination (at least with back pay, if not with full compensatory damages), and to deter discrimination in the future. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-418 (1975). To conclude that personal accountability of supervisory employees is unnecessary to reinstate victims or to award them their back pay is to neglect Title VII's broader goal of eradicating discrimination.

Moreover, while ordinarily personal liability is not of great consequence either to the plaintiff or to the individual defendant (and perhaps that is why the issue is seldom considered), there are cases, like *Vucitech*, 842 F.2d 936, in which the defendant company goes bankrupt and the plaintiff is forced to seek recovery from the supervisory employees who committed the discriminatory acts. As this court noted in *Strzelecki*, if the people who make discriminatory decisions do not have to pay for them, they may never alter their illegal behavior and the wrongdoers may elude punishment entirely, while the victim may receive no compensation whatsoever. That outcome is incompatible with the broad remedial purposes of the ADEA and Title VII, which were intended to provide all "necessary relief" and to ensure "complete justice." *Albemarle Paper Co.*, 422 U.S. at 418.

CONCLUSION

Plaintiff's motion to reconsider the court's partial dismissal of count V is granted in part and denied in part. Her motion to reconsider the court's partial dismissal of count

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VI is denied. Her motion pursuant to Fed.R.Civ.P. 56(f) is granted in part and denied in part.

s/ James B. Moran
JAMES B. MORAN,
Chief Judge, U.S. District Court

June 8, 1993.